UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/724
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 724

Case No. 774: FUSSIMANYA-REYNA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mayer Gabay;

Whereas on 17 December 1993, Montserrat Fussimanya-Reyna, a staff member of the United Nations, filed an application, in which she requested the Tribunal, inter alia:

"...

2. To order the rescission of the decision of 12 October 1993 by the Secretary-General of the United Nations directing that Ms. FUSSIMANYA be considered for a transfer and/or mission, that Ms. FUSSIMANYA's performance be evaluated by her new supervisor within one year after her appointment to a new assignment, and that a recommendation be made as to whether her overall performance would at that time be in conformity with the provisions on the long-service step as contained in document IC/Geneva/3383.

...

4. To grant Ms. FUSSIMANYA the long-service step [provided for by appendix B to the Staff Rules of the United Nations] retroactively with effect from 3 May 1990.

5. To grant Ms. FUSSIMANYA compensation in the amount of US$25,000 for the damages sustained as a result of the administrative harassment to which her supervisors have been subjecting her.

6. Grant her equitable compensation for the delay in handling the present case.

7. Award her a sum of US$5,000 for expenses."

Whereas the Respondent filed his answer on 21 October 1994;

Whereas the Applicant filed written observations on 31 May 1995;

Whereas, on 29 June 1995, the Applicant submitted additional comments and documents;

Whereas, on 6 July 1995, the Tribunal put questions to the Respondent to which he provided answers on 7 and 26 July 1995;

Whereas, on 6 July 1995, the Applicant submitted an additional statement;

Whereas, on 27 July 1995, the Tribunal informed the parties that it had decided to adjourn its consideration of the case until its 1995 Fall session.

Whereas the Tribunal also informed the parties "that it expects the classification process for the Applicant's post to be completed within three months of the date of receipt of this communication, eith by agreement on a description of the functions of the Applicant's post or by independent submissions by the parties to the Joint Classificati Committee for a recommendation, as set forth in the memorandum of 7 Ju 1995 communicated to the Tribunal by the Respondent."

Whereas, on 15 August 1995, the Applicant submitted an additional statement and further documents;

Whereas, on 6 November 1995, the Tribunal put a question to the Respondent to which he responded on 7 and 8 November 1995;

Whereas, on 9 November 1995, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations at the UN Office in Geneva (UNOG), on 3 May 1970, on a probationary

appointment, as a Spanish Typist at the G-2, step 1 level. On 1 May 1973, the Applicant was transferred to the International Narcotics Control Board and given a permanent appointment. She was promoted to the G-3 level, on 1 August 1972, as a Shorthand-Typist and to the G-4 level, on 1 July 1975. On 3 March 1980, the Applicant was transferred to the General Services Division, Building and Engineering Branch. On 1 April 1982, the Applicant's functional title was changed to Administrative Secretary.

In a memorandum dated 2 May 1990, the Applicant requested the Chief, Personnel Administration Section, to recommend granting her a long-service step. She explained that she had met the three eligibility prerequisites set forth in IC/Geneva/3383. In memoranda dated 30 July, 24 October, and 8 November 1990, the Applicant reiterated her request.

In a memorandum dated 6 December 1990, copied to the Applicant, the Chief, General Services, informed the Chief, Personnel Administration Section, that the Applicant's performance did not justify granting her the long-service step. He noted the difficulties he had had in discussing with her the necessity of reorganizing the work of the Engineering Unit, and that he had requested that she be transferred.

In a memorandum dated 17 December 1990, a Personnel Officer informed the Applicant that her request for a long-service step could not be granted, as it had not been recommended by the Chief, General Services. In a memorandum to the Applicant, dated 21 December 1990, the Chief, Personnel Service, confirmed the decision not to grant her the long-service step. On 14 January 1991, the Applicant requested the Secretary-General to review this decision. On 9 April 1991, she lodged an appeal with the Joint Appeals Board (JAB).

On 18 December 1990, the Applicant had instituted before a rebuttal panel a procedure to rebut her performance evaluation report (PER), covering the period 1 October 1986 to 31 October

1990. On 27 June 1991, the panel submitted its findings to the Chief, Personnel Administration Section, concluding that "the majority of points raised in the rebuttal" were "pertinent". The panel recommended that the PER be revised, taking into consideration its findings.

In a memorandum dated 17 July 1991, a Personnel Officer informed the Applicant that in the light of the panel's findings, the Chief, Personnel Administration Section, had decided that the PER would cover the period from 1 January 1986 to 30 September 1989, that the comment made in the PER by the Chief, Building and Technical Services Section, would be deleted, and that the overall rating would be changed to "a very good performance."

In a memorandum dated 23 July 1991, the Applicant again requested that she be granted the long-service step, noting that her performance had been found to be "very good". In a reply dated 25 July 1991, a Personnel Officer stated that as the dates covered by her PER had been revised, the PER no longer covered the date on which the Applicant completed twenty years of service. As the negative comment made by the Chief, General Services, concerned events subsequent to the period covered by the PER, he stated it was not invalidated by the changes made to the PER and that her supervisor's evaluation was still relevant to the long-service step.

On 10 August 1993, the JAB adopted its report. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 39. ... the Panel concludes that new duties and a change of the working environment are an imperative need. The Appellant should be given a new opportunity of demonstrating motivation in her work and proving commitment to producing an entirely satisfactory performance.

40. The Panel also concludes that an administrative decision on this matter should not in any way interfere with the proceedings pending at the United Nations Administrative Tribunal.

41. Accordingly, the Panel recommends that the Appellant be considered, on a priority basis, for a transfer and/or mission and to adjust the terms of such a move at a lateral level to the need of harmonizing any such administrative decision with the judgement to be pronounced by the United Nations Administrative Tribunal [Judgement No. 645].

42. The Panel also recommends that the performance of the Appellant will be evaluated, within one year after her appointment to a new assignment, by her new supervisor and that a recommendation will then be made whether her overall performance would at that time be in conformity with the provisions on the long-service step as contained in document IC/Geneva/3383."

On 12 October 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General had accepted its recommendations.

On 17 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

On 14 July 1994, the Administrative Tribunal, in Judgement No. 645, ordered the Respondent to arrange for the classification of the Applicant's post by the Joint Classification Committee, on the basis of an objective evaluation of her functions. In a memorandum dated 11 October 1994, the Under-Secretary-General for Administration and Management requested the Assistant Secretary-General for Human Resources Management to arrange for such classification. On 6 November 1995, the Director-General of UNOG approved the recommendation of the Joint Classification Committee that the classification of the Applicant's post be maintained at the G-4 level.

Whereas the Applicant's principal contentions are:

1. The Applicant has fulfilled all the requirements set forth in IC/Geneva/3383 for a long-service step.

2. The decision not to recommend the Applicant for the long-service step was based on circumstances which arose after the date of her entitlement to the long-service step.

3. The JAB's failure to make a recommendation concerning the granting of a long-service step to the Applicant, and its recommendation that she be transferred on a priority basis, were arbitrary and outside the scope of her appeal.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim to a long-service step cannot be considered pending the classification of her post, as ordered by the Tribunal.

2. The decision not to grant the Applicant a long-service step will be reviewed in the light of the results of the reclassification of the Applicant's post.

3. No compensation is due to the Applicant.

The Tribunal, having deliberated from 6 to 12 July 1995 in Geneva, and from 6 to 21 November 1995 in New York, now pronounces the following judgement:

I. Asserting that she had met the eligibility requirements, the Applicant, on 2 May 1990, requested the Chief, Personnel Administration Section, to make a recommendation that she be granted a long-service step. On 6 December 1990, she was informed that her supervisors could not make such a recommendation because her performance did not justify it, as indicated by her most recent

performance evaluation report (PER). Subsequently, as a result of a rebuttal procedure, the notation in that report regarding the Applicant's performance was changed from "a good performance" to "a very good performance".

II. On 9 April 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the administrative decision not to grant her a long-service step. In the meantime, on 15 July 1992, in a separate proceeding, the Applicant appealed to the Tribunal against a decision by the Secretary-General, in connection with her request for the reclassification of her post from the G-4 level to the G-5 level.

III. In its report on the present appeal, the JAB stated that it was difficult to make a recommendation to the Secretary-General while the judgement of the Administrative Tribunal was pending on the job classification recourse of the Appellant.

IV. On 17 December 1993, the Applicant filed the present application with the Tribunal, requesting the Tribunal, inter alia, to order that she be granted a long-service step retroactively and compensation for moral suffering in the amount of US$25,000, as well as equitable compensation for administrative delays in handling her case and US$5,000 for reimbursement of legal expenses.

V. The issue in this case is whether the decision not to grant a long-service step to the Applicant violated her rights.

The Tribunal must therefore consider the nature of the right claimed and the conditions attached to it. Information circular IC/Geneva/3383 of 15 December 1986, entitled "Long-Service Step for General Service and Other Locally-Recruited Categories", stipulates that the long-service step is subject to the following criteria:

(a) Twenty Years of service within the common system;
(b) Five years of service at the top of the grade; and
(c) Entirely satisfactory service.

VI. The Applicant has satisfied the condition set out in (a), of twenty years of service. With regard to the condition of satisfactory service, set out in (c), the Tribunal notes that the Applicant's PER was found, following a rebuttal procedure, to be "very good" for the period ending 30 September 1989. The Tribunal also notes that the Applicant completed twenty years of service thereafter, in May 1990. IC/Geneva/3383 does not, however, require that a special performance review be conducted at the conclusion of twenty years of service in order for the long-service step to be granted. For the purposes of condition (c), particularly in view of the procedural irregularities acknowledged by the Respondent, concerning the Applicant's performance evaluation, the PER covering the period through September 1989 will be regarded by the Tribunal as continuing in effect to the Applicant's completion of twenty years' service. Hence, the Tribunal finds that the Applicant has met the condition set forth in (c).

A question remained as to whether the Applicant had five years of service at the top of her grade, the condition set out in (b). Throughout the five year period, the grade and level of the post encumbered by the staff member concerned must remain unchanged. In its Judgement No. 645, dated 14 July 1994, the Tribunal, in view of the Applicant's request for reclassification of her post, ordered that the Applicant's case be remanded to the Respondent for the purpose of arranging "for the classification of the Applicant's post by the Joint Classification Committee, on the basis of an objective evaluation of her functions." On 11 October 1994, the Secretary-General directed that the Tribunal's decision be implemented. On 8 November 1995, the Tribunal was informed of the recommendation of the Joint Classification Committee, approved

by the Director General of UNOG, to maintain the Applicant's post at the G-4 level. Hence, the condition set out in (b) has also been met. The Applicant is therefore entitled to the long service step.

Accordingly, the Tribunal considers that the Applicant's claim for a long-service step should be granted, with effect from 3 May 1990.

VII. As part of her claim, the Applicant asserts that the decision not to grant her the long-service step was motivated by discrimination or other improper motivation on the part of the Respondent. In this respect, the Tribunal has consistently held that the Applicant bears the burden of showing that prejudice or other improper motivation were the basis for decisions impugned. Specifically, it has held:

> "Under the Tribunal's consistent jurisprudence, the burden of proving prejudice or other improper motivation rests with the Applicant." (Judgement No. 465, Safavi (1989), para. V)

The Tribunal finds that the Applicant has failed to meet the burden of proof.

VIII. Similarly, the Tribunal believes that the Applicant has not demonstrated that she has suffered harm which would warrant the granting of any compensation for damages sustained as a result of the decision not to grant her a long-service step.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount corresponding to a long-service step with effect from 3 May 1990.

X. The Tribunal rejects all other pleas.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary